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Supreme Court, U.S.
FILED
MAY 14 2003
OFFICE OF THE CLERK

No. 02-1497

In The

Supreme Court of the United States

AGNES DE LIMA PAIVA and ANTHONY PAIVA,

Petitioners,

vs.

COUNTRYWIDE HOME LOANS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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17 pp

QUESTION PRESENTED FOR REVIEW

Whether the allegations of a Complaint should be adequate to defeat summary judgment, even in light of the fact that Petitioners filed no opposition to Respondent's summary judgment motion.

CORPORATE DISCLOSURE STATEMENT

The parent of Respondent Countrywide Home Loans, Inc. is Countrywide Credit Industries Inc., a publicly traded corporation listed on the NY Stock Exchange, symbol "CCR", and a member of the Standard & Poors 500. The company has no knowledge of any publically owned companies whose share holdings exceed 10% of the company's stock.

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REASONS FOR DENYING THE PETITION

I. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

The true underlying premise of the pending Petition for Writ of Certiorari (the "Petition") is that the allegations of a Complaint should be adequate to defeat summary judgment, regardless of whether Petitioners opposed Respondent's summary judgment motion. The premise is not supported by the law. Additionally, given the facts of this case, where Petitioners' own admissions defeat their claims, the Petition should be denied.

The Petition, however, characterizes a simple review of the contents of the Complaint during the course of a deposition as a sworn statement of the allegations of the Complaint. The Petition omits the fact that the subject depositions (attached in their entirety to the summary judgment motion) include admissions which waive any claim based on the allegations in the Complaint. Those misrepresentations of the record should preclude the granting of the instant Petition, as the question raised by the Petition is not based on the record.

However, on the misrepresentations of the record, the Petition posits that if a deposition includes sworn statements of the accuracy of the allegations of the Complaint, and if Respondent attaches the entire deposition transcript to their motion for summary judgment, then even if the Respondent's motion is unopposed, the District Court is nonetheless bound to examine the record to determine whether any such sworn statements might be buried within the deposition, thus raising a genuine issue of fact and precluding summary judgment. On the basis of the

actual record, the District Court would also be required to simultaneously ignore any contradictory testimony in the same deposition. In this case, there is no showing that the District Court did not review and consider the entire record.

Petitioners' pro se Complaint was initially the subject of a motion to dismiss as a result of Petitioners' failure to cooperate with discovery; it was only when the court ordered the Petitioners to comply with deposition notices and document requests, on a threat of dismissal, that discovery proceeded. During the course of the depositions, in which the elderly Petitioners continued to represent themselves, the depositions included a review of the Complaint.

The Complaint alleged violations of the Truth-In-Lending Act ("TILA"), 15 U.S.C. §1635. The Petition is premised on the specific allegation of failure to deliver, to each borrower, two copies of the required Notice of Right to Cancel (the "Notice"), pursuant to 12 C.F.R. §226.23(b) (Regulation Z), in a qualified TILA transaction.[1] The alleged sworn testimony concerned whether Petitioners had each received the required two completed copies of the

[1] Contrary to the statement in footnote 3 in the Petition, the alleged TILA violation of incorrect disclosures was addressed by both the District Court (Appendix to Petition, at A15), and on appeal to the Ninth Circuit Court of Appeals (Appendix to Petition, at A20). The alleged TILA issue of signing premature waivers was addressed below, but not until the Fed. R. Civ. P. 59 motion, after summary judgment had been granted. (Appendix to Petition, at A14 and A20.) Even then, Petitioners did not submit any sworn testimony that the confirmations were signed prematurely, it is simply a presumption argued by their counsel.

Notice of Right to Cancel. The portions of the transcript cited in the Petition to show these allegedly sworn statements are taken out of context; the District Court recognized this fact and situation in its "Order Denying Plaintiffs' Rule 59(e) Motion to Set Aside Judgment, filed June 18, 2001." As stated by the court:

> Plaintiffs' sworn statements did not actually aver nondelivery in a manner that created a genuine issue of material fact. Plaintiffs' deposition testimony merely stated that the Complaint alleged nondelivery of the required notices of right to cancel; Plaintiffs did not actually testify that they had not received the required notices. . . . Plaintiffs could not rely on the mere allegations in the Complaint to survive summary judgment.

(See Appendix to Petition, at A13). This quotation from the court's ruling clearly shows that the court did review the record, which is exactly the result sought by Petitioners. It also demonstrates the context of the quotation in the Petition, and the failure to establish a genuine issue of material fact.

Petitioners' own production of documents included only two copies of the Notice. However, Respondent produced two additional copies of the Notice. Each was signed by one of the two Petitioners. The Petitioners' signatures appeared on confirmation certificates (a separate part of the Notice) in which Petitioners certified and warranted that they did not desire to exercise any right to rescind the transaction, and that they ratified and confirmed the transaction in all respects. More specifically, each signed Notice from Respondent's files included Petitioners' individual signatures, dated four days after the closing, waiving any right to rescind. During the course of the

depositions, each Plaintiff authenticated their own signature on the respective confirmation certificates. The certificates, of course, rendered moot the allegations of insufficient copies of the Notice, both for the waiver of the right, but also because they demonstrated that there had, at some point, been at least four (4) copies of the Notice. Thus, the deposition testimony completely rebutted the import of the allegations of non-delivery.

On those facts, the record does not support the question presented in the Petition. Specifically, the documentary evidence is not sufficient as a matter of law to establish the existence of material facts, as it is merely the allegations of the Complaint. Petitioners cannot rely on the mere allegations in the Complaint to survive summary judgment. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Further, the allegations were rendered moot by Petitioners' own admission of the accuracy of their signatures on the documents certifying, after the initial rescission period had expired, the waiver of any right to rescission.

II. THE PROCEEDINGS IN THIS CASE ARE NOT REPRESENTATIVE OF ANY SPLIT IN THE CIRCUITS CONCERNING SUMMARY JUDGMENT PROCEEDINGS

The Petition seeks the time and attention of this Court to address a purported split in the circuits as to the time and effort required of a district judge in summary adjudications. The question as posed is "how much time and effort must a district judge devote to such summary adjudications." (Petition, at 5). However, the purported split in the circuits is demonstrated by the existence of one case from the First Circuit, *Stepanischen v. Merchants*

Despatch Transportation Corp., 722 F.2d 922 (1st Cir. 1983), in which the court allegedly held that a district judge has an affirmative duty to look at the entire record in deciding Rule 56 motions. (Petition, at 6). The Petition cites disagreement from the Fifth, Sixth and Ninth Circuits. (Petition, at 7). Petitioners' argument is disingenuous, as demonstrated by a review of the First Circuit case.

The *Stepanischen* case, written in 1983, does include the quotations included in the Petition. The record in that case showed that on summary adjudication, plaintiff provided minimal opposition to the district court, whereupon the district court granted summary judgment to defendants. 722 F.2d at 927-928. On appeal, a much more substantial brief was provided. 722 F.2d at 927. On review of all of the record presented, the appellate court reversed, providing special attention to the fact that the basic issue in the case was a question of state of mind. 722 F.2d at 928. It is the discussion thereafter which decimates the premise in the instant Petition that there is any definitive split in the circuits warranting the attention of this Court. Specifically, the court stated as follows:

> A district court might deal with the problems of the sprawling record by ordering the party moving for summary judgment to provide a list of undisputed facts, buttressed by appropriate record citations, that would entitle the moving party to summary judgment. The court could then order the opposing party to provide a counter-list of genuine, material factual issues, again with appropriate record citations, that would preclude summary judgment. And once so warned, a party's failure to comply would, where appropriate, be grounds for judgment against that party.

> [O]ther district courts faced with the recurrent problem of "ferreting through the record" have enacted local rules requiring counsel to offer the court guidance. . . . Judges might consider, for example, adopting a local rule, pursuant to Fed. R. Civ. P. 83, along the lines of Civil Rule 3(g) of the United States District Court for the Southern District of New York.

722 F.2d at 931. The *Stepanischen* court then quoted the New York rule which is almost identical to the Local Rule adopted by the United States District Court for the District of Hawaii, effective February 15, 1995 (and therefore in effect during the procedural history at issue).[2] The Local Rule in the District of Hawaii states as follows:

> (a) Motion Requirements. A motion for summary judgment shall be accompanied by a supporting memorandum and separate concise statement detailing each material fact as to which the moving party contends that there are no genuine issues to be tried that are essential for the court's determination of the summary judgment motion.
>
> (b) Opposition Requirements. Any party who opposes the motion shall file and serve with his or her opposing papers a separate document containing a concise statement that:
>
> 1. Accepts the facts set forth in the moving party's concise statement; or

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[2] The Hawaii Local Rule has had minor modifications which do not affect this analysis.

> 2. Sets forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.
>
> * * *
>
> (g) Admission of Material Facts. For purposes of a motion for summary judgment, material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party.

LR 56.1 (D. Haw.). Thus, Hawaii has already taken the steps suggested by the First Circuit in *Stepanischen* to alleviate the problems of inadequate briefing and provided adequate warning. The Hawaii rule was already in place when Petitioners here failed to even oppose the Respondent's motion for summary judgment in any manner, much less in the manner designated by the Local Rules.

The purported split in the circuits is demonstrated only by *Stepanishchen*, from which it clearly can be inferred that the court would reach a different result, had the local rules included a requirement that the opposing party must offer the court guidance to find any disputed issues of material facts. Because the Local Rules of the District of Hawaii have already incorporated that suggestion, the argument of any split between the circuits, or any need to clarify the requirements of the District Court for the District of Hawaii, lacks merit.

III. THE DECISION BELOW WAS CORRECT ON THE MERITS

The case was properly dismissed, on the merits. First, as demonstrated above, Petitioners failed to comply with the Local Rules, and, because Respondent carried its

burden on summary judgment, the motion was granted. Second, regardless of whether Petitioners could prove that they had not received two copies each of the Notice of Right to Cancel, the unrebutted fact is that they confirmed, after their three day rescission period had expired, their waiver of any right to rescind by signing the confirmations provided. They dated the documents themselves, and confirmed the writings in their depositions.

The confirmations are not subject to criticism, as they were not in the nature of the waivers which were criticized in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994). Rather, Petitioners' Confirmation Certificate clearly stated in BOLD lettering:

> DO NOT SIGN UNTIL THREE BUSINESS DAYS HAVE ELAPSED.

In the confirmation certificates (a separate part of the Notice), Petitioners substantively certified and warranted that they did not desire to exercise any right to rescind the transaction, and that they ratified and confirmed the transaction in all respects. Since the mandatory rescission period had already expired, only an extended right under 12 C.F.R. §226.23(a) would have existed thereafter. A waiver of an extended right to rescind was endorsed in *Smith v. Highland Bank*, 915 F.Supp. 281 (N.D. Ala. 1996), aff'd, 108 F.3d 1325 (11th Cir. 1997). In *Smith*, the Court noted distinctions between forms of notices, and affirmed summary judgment against the borrower where the "Certificate of Confirmation" was part of one form which contained both the waiver of the right to rescind and the Notice, with language similar to the form signed by the Petitioners here, signed four days after the closing. On

that basis, the dismissal, affirmed by the Ninth Circuit Court of Appeals, was correct.

CONCLUSION

For the foregoing reasons, Countrywide Home Loans respectfully requests that the Court deny the Paivas' Petition for a Writ of Certiorari.

Respectfully submitted,

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